



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. SUCCESSION CAUSE NO. 22 OF 2016

IN THE MATTER OF ESTATE OF RAUNI MBUTU (DECEASED)

AND

ALEXANDER MBAKA.....APPLICANT

VERSUS

ROYFORD MURIUKI RAUNI.....1ST RESPONDENT

JAPHET MUTEMBEI KITHINJI.....2ND RESPONDENT

ERIC WACHIRA GITONGA

CASTY KAWIRA JAMES.....3RD DEFENDANT

DAVID GITONGA JAMES.....4TH REPENDENT

HUMPHREY MUGENDI JAMES.....5TH RESPONDENT

JEDIEL MURITHI JAMES.....6TH RESPONDENT

RULING

1. Rauni Mbutu (hereinafter "*the deceased*") died on 4th February, 2004 aged 84 years. He left a property known as Magumoni/Mukuuni/814 as his only asset. On 27th February, 2012, Royford Muriuki Rauni (hereinafter "the 1st Respondent") petitioned for Letters of Administration intestate for the estate of the deceased. In Form No. P&A 5, he disclosed David Gitonga James, Humprey Mugendi James, Jediel Murithi James, Eric Wachira and Casty Kawira as the only beneficiaries of the estate of the deceased. A grant was issued to the 1st Respondent on 2nd April, 2012 which was confirmed on 4th December, 2012.

2. On 20th June, 2016 Alexander Mbaka (hereinafter "the Applicant") lodged an application for, inter alia, the revocation of that grant under section 76 of the Law Succession Act, (hereinafter "the Act"). He also sought orders to restrain the Respondents from evicting him from a portion of 0.50 acres which had been awarded to the applicant from LR Magumoni/Mukuuni/359 and an order of inhibition against Magumoni/Mukuuni/2774, 2775, 2776, 2777, 2778 and 2779 which he claimed to have been from the then original parcels Magumoni/Mukuuni/359 and 814, respectively. The grounds upon which the said application was made were both set out in the body of the summons and the Supporting Affidavit of Alexander Mbaka sworn on 28th June, 2016. This court granted the orders of injunction and inhibition exparte for reasons on record.

3. Faced with this application, the Respondents filed a Notice of Preliminary Objection on 14th July, 2016. This ruling is in respect of that objection which was argued on the basis of written submissions on record.

4. The Preliminary Objection raised six (6) broad points of law. That this court lacks jurisdiction to entertain land matters by virtue of Articles 165 (5) and 162 (2) of the Constitution; that the application was statute barred by virtue of section 4 (1) (c) and 4 (4) of the Limitation of Actions Act; that the award of the Land Dispute Tribunal ("L.D.T") Case No.16 of 2003 was ultra vires the Land Disputes Tribunal Act No. 18 of 1990 as the deceased already had title to Magumoni/Mukuuni/359; that the applicant's claim of purchase of land was in breach of section 3 (3) of the Law of Contract Act Cap 23 Laws of Kenya; that the application offends Order 32 Rule 3 of the Civil Procedure Rules and finally that the application was in breach of Sections 32 to 42 of the Act.

5. Mr. Kijaru learned Counsel for the Respondents submitted that since the award of the LDT, which was the basis of the Applicant's claim, was read on 13th August, 2003, the Applicant cannot seek to enforce it now, after a period of close to 14 years after when it was made. Counsel cited the cases of **Willis Onditi Odhiambo .v. Gateway Insurance Co. Ltd [2014] eKLR** and **National Bank of Kenya Ltd. v. Devji Bhimji Sanghani & Anor T/a Sanghani Builders [2016] eKLR** in support of that submission. He further submitted that by dint of sections 32 to 42 of the Act, the Applicant's claim is as against the 1st Respondent only which in any event is a non-starter as the Applicant is not a blood relation as provided for under those sections of the law; that the only route open to the Applicant is that of adverse possession which is the preserve of the Environment and Land Court by virtue of Articles 162 (2) and 165 (5) of the Constitution; that the LDT did not have jurisdiction to entertain a claim on land that was already registered. In the circumstances, Counsel urged the court to dismiss the application with costs.

6. The objection was opposed. Mr. Kamunyoru learned Counsel for the Applicant submitted that this court has jurisdiction to entertain the matter as it concerns revocation of a grant issued by a family court; that by dint of S76 of the application for revocation can be made at any time and cannot be barred by Section 4 (4) of the Limitation of Actions Act (hereinafter "the Limitation Act"). As regards the contention that the LDT acted ultra vires on the basis that the deceased already had a title to the property and on the absence of a contract in writing, Counsel submitted that these were not proper points for a preliminary objection but which should be argued on the merit of the application. As regards Sections 32 to 42 of the Act, Mr. Kamunyoru submitted that Section 76 of the Act gave the Applicant locus by the use of the words "**.....any interested party**". That the issue of blood relation does not therefore arise. Counsel urged that the objection be dismissed and his client's application be heard on merit.

7. I have considered the Affidavit evidence on record and the submissions of learned counsel. What is for consideration is the Respondent's Preliminary Objection dated 13th July, 2016. In terms of the case of **Mukisa Biscuits Manufacturing Co. Ltd .v. West End Distributors Ltd [1969] EA 696**, a Preliminary Objection must only consist pure points of law and not fact. In that case, Sir Charles Newbold delivered himself thus:-

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

8. The Respondents have not filed any Affidavit in reply to the Application. The facts pleaded by the Applicant are therefore to be taken to be correct. These are that; the deceased was the registered owner of the property known as LR Magumoni/Mukuuni/359; that on 4th May, 1987, the deceased caused that property to be subdivided into Magumoni/Mukuuni/813 and 814, respectively. That on an undisclosed date, the Applicant lodged a claim before the Magumoni Land Disputes Tribunal claiming entitlement to a portion in Magumoni/Mukuuni/359; that on 14th January, 2003, the LDT ruled that the Applicant was entitled to a portion of half an acre (0.5) in Magumoni/Mukuuni/359. That award was adopted by the Chuka Principal Magistrate's Court on 13th August, 2003 in Chuka SPMCC LDT No. 16 of 2003 and became a decree of the court. That that decree has never been appealed against, reviewed or varied.

That decree, by way of an order, was in the following terms:-

"RAUNI MBUTU Parcel No. Magumoni/Mukuuni/359 to give 1/2 acre to the Plaintiff of this case ALEXANDER MBAKA to stay there with the wife of his father and children who are in that land now of APHAXARD NDERI."

Those then constitute the undisputed facts upon which the objection is to be determined.

9. Mr. Kijaru did not argue ground 5, that the application offends Order 32 Rule 3 of the Civil Procedure Rules. I have looked at that provision and I agree with Mr. Kamunyori that the same was completely misplaced and must have been properly abandoned. As regards grounds 3 and 4 of the objection, regarding the acts of the LDT being ultra vires the section 3 of Land Dispute Tribunal Act No. 18 of 1990 and section 3 (3) of the Law of Contract Act Cap 23 of the Laws of Kenya, this court entertains doubt whether this is the correct forum to raise those issues. As already noted, the award and decree have not been challenged by way of appeal or review. In this court's respectful view, the said grounds can only be properly raised either on appeal or setting aside proceedings or enforcement proceedings. Accordingly, the said grounds are rejected. That leaves ground numbers 1, 2 and 6 of the notice for determination.

10. The first issue to address is whether the application is time barred by dint of section 4 (4) of the Limitation Act. Mr. Kijaru submitted that since the Applicant's claim is based on a decree that was passed in August, 2003 the same was more than 14 years and cannot therefore be enforced. On the other hand, Mr. Kamunyori submitted that the provisions of section 76 of the Act are not subject to any statute. That because the rights provided therein can be exercised at anytime, there can be no time bar to an application under that section. That section provides:-

"76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion....."

The use of the words "***..... may be made at any time.....***" to my mind suggests that there is no time bar as to when the right set out therein can be exercised. That right can be exercised at anytime by either an interested party or by the court whether the grant has been confirmed or not. The question to be answered however, is what are the rights of the Applicant that he intends to exercise or he wishes to be protected by the invocation of section 76 of the Act.

11. The Applicant's claim is based on a decree that was made on 13th August, 2003. Is that right still in existence and capable of being protected and/or enforced?. That is where section 4 (4) of the Limitation Act comes in. The section provides:-

" 4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

(Emphases provided).

12. In the case referred to by Mr. Kijaru of ***Willis Onditi Odhiambo .v. Gateway Insurance Co. Ltd [2014] eKLR*** the Court of Appeal delivered itself as follows on the application of that section:-

"The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008. The suit which was first filed by the appellant ie Kisumu CMCC No. 12 of 2009 and the second one, being Winam Principal Magistrate's Court Civil Case No. 53 of 2012, were both plainly filed out of time."

13. In a subsequent decision of **National Bank of Kenya Ltd .v. Devji Bhimji Sanghani & Anor T/a Sanghani Builders (supra)** the Court of Appeal, differently constituted, held:-

"This court in Willis Onditi Odhiambo .v. Gateway Insurance Co. Ltd (Supra) clearly expressed that execution of judgments and/or decrees is governed by section 4 (4) of the Limitation of Actions Act and an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.

We have examined the nature, import and purport of the instant application. The present application is an indirect application to re-open and argue an appeal that has been heard and determined. The applicant requires this court to re-open the appeal more than twelve years after delivery of the judgment. The twelve years limitation period applies and this court has no jurisdiction to reopen a matter that has been determined. Further, the parties in this case had the option to move this court for settlement of terms. This was not done; instead the parties went to Deputy Registrar of this Court. The Deputy Registrar in his ruling dated 16th November, 2007 correctly held that he had no powers to interfere with this court's judgment. Without pronouncing ourselves on the merit of the present application, we come to the conclusion that the application is time barred under section 4 (4) of the Limitation of Actions Act with the consequence that the Notice of Motion application dated 15th November, 2010 is hereby dismissed with costs to the Respondents therein."

14. From the foregoing, it is clear that once a decree, judgment or order of a court has passed the 12th year of its issuance, it cannot be enforced. It becomes stale, nothing, it expires, the rights declared therein dissipate. It becomes as if it never existed. The rights declared therein cease to exist!. Simply put, the life of a decree, judgment or order which remains unexecuted is simply 12 years and nothing more. That is my reading of section 4 (4) of the Limitation Act as elucidated by the Court of Appeal in the two cases cited above.

15. In the present case, the decree upon which the Applicant claims the right to be interested in the estate of the deceased was passed on the 13th August, 2003. The same should have been enforced and or executed by the 12th August, 2015. The present application was filed on 30th June, 2016, twelve (12) years and nine (9) months after the date the decree was passed. There is no evidence that the said decree was ever executed or sought to be enforced before the filing of the present application. To my mind, the rights, if any, contained in that decree cannot be sought to be enforced now. They are barred by dint of section 4 (4). I therefore reject the contention that since section 76 of the Act allows an application for revocation to be made at anytime, one can invoke that section when his claim is already expired or when the enforcement of his right is specifically barred by another statutory provision such as section 4 (4) of the Limitation Act.

16. In any event, I do not think the High Court sitting as a family Court has jurisdiction to determine the right to ownership of land. In the case of **Jackson Kamau Nthiga .v. Humprey Kirimi Mbuba & Another Chuka H.C Succ. Cause No. 660 of 2015 (UR)** the court held:-

"Ms. Rimita referred this court to various decisions on the point. these include Francis Musyoki Kilonzo & Anor .v. Vincent Mutua Mutiso [2013] eKLR, Nancy Waithira Marete .v. Catherine Kathoni Marete & Anor [2014] eKLR and Muriuki Musa Hassan .v. Rose Kanyua Musa & 4 Others [2014] eKLR. The net holding in those decisions was that the jurisdiction of a family court dealing with a Succession Cause is limited. Such court's sphere of inquiry is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate. Such a court cannot delve into establishing the validity of a claim such as the one before this court. In the case before this court, there are serious issues that need to be established and/or ascertained by either the lower court or the court which has jurisdiction to entertain a claim to land. That however, does not bar a family court from ascertaining if one is a creditor of an estate. In the circumstances of this case, the Interested Party and the Objector have not yet been so determined by a court of law. This court cannot determine their claims in these proceedings."

17. To my mind what the court was saying in the said case is that, the role of the family court is well set out in the Act, to ascertain the assets, the liabilities, if any, the beneficiaries and determine the mode of distribution an estate period. It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. That claim is to be considered as a liability to the estate. This court, in my view cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such a right has not yet crystallised. The right must first be shown to have crystallised before the family court can entertain it as a liability in succession proceedings.

18. In the present case, I have already made a finding that the right of the Applicant flowing from the decree in Chuka SPM LDT case No. 16 of 2003 is time barred. That right was in respect of half (1/2) an acre in Magumoni/Mukuuni/359. The property the subject of this succession is Magumoni/Mukuuni/814. Since Magumoni/Mukuuni/359 ceased to exist on 4th May, 1987 (see Annexure "AM1"), several issues arise. These are; whether the decree passed sixteen (16) years later, in August 2003 directed at that non-existent title would be valid; and whether that decree referred to or affected Magumoni/Mukuuni/813 or 814 which were the resultant sub- divisions? These are issues which, in my view, can only be properly determined by the Environment and Land Court under Article 162 of the Constitution and not this court.

19. In this regard, I am of the view and so hold that ground Nos. 1 and 2 of the Preliminary Objection dated 13th July, 2016 are meritorious. They are allowed and I see no basis of considering ground 6 of the Notice. The Application dated 28th June, 2016 is therefore struck out with costs to the Respondents. Consequently, the orders made by this court on 4th July, 2016 are hereby discharged and set aside.

It is so ordered.

DATED and delivered at Chuka this 22nd day of September, 2016.

A.MABEYA

JUDGE

Ruling read and delivered in open court in the absence of counsel for the Applicant but in the absence of Counsel for the Respondent who was aware of the Ruling date.

A.MABEYA

JUDGE- 22/9/2016